IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

IN RE:	§	
	§	
CAPITAL ASSOCIATES INTERNATIONAL, INC.	§	CASE NO. 01-21061-RLJ-11
	§	
	§	
Debtor	§	
CAPITAL ASSOCIATES INTERNATIONAL, INC.	§	
	§	
	§	
Plaintiff	§	
	§	
v.	§	ADVERSARY NO. 03-2017
	§	
BANC ONE LEASING CORPORATION,	§	
	§	
Defendant	§	

MEMORANDUM OPINION AND ORDER

I. Introduction

The court considers whether this adversary must be tried to a jury. Banc One Leasing Corp. ("Banc One"), the defendant, made a jury demand in its original answer to Capital Associates International Inc.'s ("Capital Associates's") complaint. Banc One seeks to withdraw its jury demand, and contends that a contractual jury waiver waives all jury rights in the present adversary. Capital Associates argues that Banc One cannot withdraw its jury demand without Capital Associates's consent, which Capital Associates refuses to grant. Additionally, Capital Associates argues that the contractual jury waiver in question does not apply to the present adversary, and that the parties otherwise have a Seventh Amendment right to trial by jury. The court must therefore decide the

following issues: (1) whether the contractual jury demand waives jury rights; (2) whether Banc One may withdraw its jury demand; and (3) whether jury rights otherwise attach to this adversary.

II. Procedural History

As the dispute here has arisen in a somewhat unusual manner, a brief recounting of the parties' procedural posturing is in order. Capital Associates did not demand a trial by jury in its original complaint. Rather, Banc One, within its original answer, made such demand. Capital Associates, agreeing with Banc One that jury rights attach to this adversary, did not contest Banc One's jury demand, but instead filed a motion to withdraw the reference with the district court based on a belief that the bankruptcy court could not, or would not, try this adversary before a jury. On June 11, 2003, Banc One filed its response to Capital Associates's motion to withdraw the reference stating it was withdrawing its demand for trial by jury, thereby arguably mooting Capital Associates's motion.

In accordance with the Local Rules, the court on June 17, 2003, held a status conference on Capital Associates's motion to withdraw the reference. At such status conference, Capital Associates argued that Banc One was prohibited from withdrawing its demand for trial by jury, except with the consent of all the parties. Capital Associates stated it desires a jury trial, and that it had relied on Banc One's jury demand in not making such a demand before the time for making such expired. In response, Banc One submits that a jury waiver provision contained in a lease agreement between predecessors to Capital Associates and Banc One is binding on the parties. Thus, Banc One argues that, irrespective of whether jury rights attach to the present adversary, or whether Banc One may now withdraw its jury demand, the parties have otherwise contractually waived their jury rights.

The parties have therefore come full circle: Banc One, which originally demanded a trial by jury now argues that the parties have waived jury rights, and accordingly seeks to withdraw its jury demand, while Capital Associates, which did not originally demand a jury trial, now desires a jury trial and seeks to prevent Banc One from withdrawing its jury demand.

III. Facts

First American Capital Management Group Inc. ("First American") entered into a lease with General Motors Corporation ("GMC") on May 1, 1995 ("GM Lease"). The GM Lease generally provided that First American would lease in excess of thirty million dollars worth of equipment to GMC for a finite period, with options to renew such lease or to purchase the equipment at the expiration thereof. The GM Lease contains a waiver of jury rights provision, and generally provides that the provisions of the lease are binding on assignees.

First American subsequently sold the equipment and the GM Lease to Capital Associates on December 20, 1995. Contemporaneously with such sale, Capital Associates and Pitney Bowes Credit Corporation ("Pitney Bowes") executed a contract ("Master Purchase Agreement") whereby Capital Associates sold to Pitney Bowes its interests and rights as lessor under the GM Lease. As part of such transaction, Capital Associates and Pitney Bowes entered into an agreement ("Remarketing Agreement") whereby Pitney Bowes allegedly appointed Capital Associates its exclusive agent for remarketing or releasing the equipment subject of the GM Lease. Capital Associates contends the Remarketing Agreement entitles Capital Associates to a share of remarketing proceeds.

On March 29, 1996, Pitney Bowes assigned its rights and obligations under the GM Lease, the Master Purchase Agreement, and the Remarketing Agreement to Banc One. Capital Associates

alleges that Banc One subsequently remarketed or released the equipment covered by the GM Lease, and that Banc One failed to pay Capital Associates its alleged share of the remarketing proceeds. Capital Associates's share of such proceeds allegedly amounts to at least $3.5 million, recovery of which is sought by the present adversary.

IV. Discussion

The court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(e). The parties disagree over whether this proceeding is a core proceeding under 28 U.S.C. § 157(b). The parties have, however, consented to the bankruptcy court entering final orders under 28 U.S.C. § 157(c)(2) to the extent that any issues arising herein are non-core.

A. Whether Parties Contractually Waived Jury Rights

The bankruptcy court determines, in the first instance, whether the parties to an adversary are entitled to a trial by jury. *See, e.g., Official Committee of Unsecured Creditors v. TSG Equity Fund L.P. (In re Envisionet Computer Servs. Inc.)*, 276 B.R. 1, 6 (D. Me. 2002); *Quarles v. Wells Fargo Home Mortgage Inc. (In re Quarles)*, – B.R. –, 2003 WL 21277247 *1 (Bankr. E.D. Ark. 2003). Whether a party has a right to a trial by jury in federal court is a question of federal law. *See Smith v. Louisville Ladder Co.*, 237 F.3d 515, 526 (5th Cir. 2001). In this context, a party may waive its right to a jury by contract, when such waiver is made in a knowing, voluntary, and intelligent manner. *See RDO Fin. Servs. Co. v. Powell*, 191 F. Supp.2d 811, 813 (N.D. Tex. 2002). The party seeking to enforce a contractual jury waiver provision bears the burden of proving its enforceability. *See id*.

The court, guided by applicable principles of contractual interpretation, must first determine whether the contractual jury waiver actually purports to waive jury rights. *See, e.g., Medical Air Tech. Corp. v. Marwan Inv. Inc.*, 303 F.3d 11, 18-19 (1st Cir. 2002). In this context, courts construe purported contractual jury waiver provisions strictly against waiver, and will indulge every reasonable presumption against waiver. *See Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S. Ct. 809, 811-12 (1937) ("as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver"); *Medical Air Tech. Corp.*, 303 F.3d at 18 ("There is a presumption against denying a jury trial based on waiver, and waivers must be strictly construed"); *American Standard Inc. v. Carne Co.*, 60 F.R.D. 35, 42-43 (S.D.N.Y. 1973). As explained by the Fifth Circuit, "[t]he right of jury trial is fundamental, and courts must indulge every reasonable presumption against waiver. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Jennings v. McCormick*, 154 F.3d 542, 545 (5th Cir. 1998) (internal quotations and citations omitted).

The GM Lease contains the following provision:

> Lessee and lessor hereby unconditionally waive their rights to a jury trial of any claim or cause of action based upon or arising out of, directly or indirectly, this lease, any of the related documents, any dealings between lessee and lessor relating to the subject matter of this transaction or any related transactions, and/or the relationship that is being established between lessee and lessor. The scope of this waiver is intended to be all encompassing of any and all disputes that may be filed in any court . . . . This waiver shall apply to any subsequent amendments, renewals, supplements, or modifications to this lease, and related documents, or to any other documents or agreements relating to this transaction or any related transaction.

G.M. Lease at ¶ XXI(a).

Capital Associates argues that this waiver was intended to apply to disputes arising between the lessor and the lessee, whereas Capital Associates and Banc One are both successors in interest to the original lessor whose relationship is governed by the Master Purchase Agreement and the Remarketing Agreement – not the GM Lease. Furthermore, Capital Associates argues that the current dispute in no way involves the lessee, which continues to be GMC. Banc One counters by arguing that: (1) the GM Lease is binding on both Capital Associates and Banc One as assignees; (2) the jury waiver provision applies to claims "based upon . . . directly or indirectly" the GM Lease; and (3) the GM Lease is at the core of the relationship between Capital Associates and Banc One, meaning that Capital Associates's claims are based, at a minimum indirectly, on the GM Lease.

Banc One's contention makes sense if the jury waiver provision is read as providing for a waiver of each party's jury rights independent and irrespective of the other party's jury rights. However, if the jury waiver provision is intended to, and provides for, a mutual waiver of jury rights in disputes directly or indirectly affecting the lessor and the lessee, i.e. horizontally, then Banc One's argument fails because the present dispute arises vertically, i.e. between two successors in interest of the same original interest. From Banc One's perspective, the lessor and the lessee must have each, independently of the other, waived their jury rights on "any claim or cause of action based upon or arising out of, directly or indirectly, this lease, any of the related documents . . . ." *Id*.

Banc One's construction of the jury waiver provision is too broad. For example, if leased equipment malfunctions and injures an employee, who then sues the lessor in tort, the lessor has arguably waived its jury rights because such tort action arises indirectly as a result of the GM Lease. Such interpretation of the jury waiver provision is unreasonable because it cannot seriously be argued

that the lessor in such example has knowingly or intelligently waived its jury rights with respect to such action. *See First Union Nat'l Bank v. United States*, 164 F. Supp.2d 660, 663 (E.D. Pa. 2001) (noting that determination of 'knowingly' and 'voluntary' is "based on the facts of the case"); *Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp.*, 913 F. Supp. 1088, 1146-47 (N.D. Ill. 1995) (refusing to honor jury waiver in part because causes of action before the court "do not directly arise or have their basis" in the contract containing such waiver).

The court construes the jury waiver provision here as controlling over disputes arising between the lessor and the lessee and their respective assigns. This is borne out by further analysis of the jury waiver provision: "any dealings *between* lessee and lessor relating to the subject matter of *this transaction* . . . and or the *relationship* that is being established *between* lessee and lessor." G.M. Lease at ¶ XXI(a) (emphasis added). That the jury waiver provision operates horizontally – only between the lessor and the lessee – is further supported by the case law which holds, in no uncertain terms, that such provisions are to be construed against waiver and that every reasonable presumption against waiver must be indulged. *See, e.g., Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S. Ct. 809, 811-12 (1937). *Cf. Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986) (holding that lessee had contractually waived jury rights in suit between lessee and assignee of lessor; in this case, the dispute was horizontal, i.e. between the lessor and the lessee).

As the jury waiver provision in the GM Lease operates as between the lessor and the lessee, the question is whether the present dispute arises in such context. It does not. The GM Lease sets forth the rights and responsibilities as between the lessor and the lessee, but Capital Associates and Banc One are both successors in interest to the original lessor. Thus, the GM Lease sets forth their

rights and obligations vis-a-vis GMC, the lessee, not as to each other. Their relationship is governed by the Master Purchase Agreement and the Remarketing Agreement, neither of which contain a jury waiver provision. Accordingly, neither Capital Associates nor Banc One has contractually waived its jury rights with respect to the present adversary.

B. Whether Banc One May Withdraw Its Jury Demand Without Capital Associates's Consent

Rule 38(d) of the Federal Rules of Civil Procedure, which is incorporated by Rule 9015 of the Rules of Bankruptcy Procedure, provides that "[a] demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." FED. R. CIV. P. 38(d). Thus, Rule 38(d) allows all parties to a lawsuit to "rely on one party's demand by providing that a proper demand can only be withdrawn with the consent of the parties." *Rachal v. Ingram Corp.*, 795 F.2d 1210, 1214 (5th Cir. 1986). There can be no doubt that a jury demand timely made may not be withdrawn except with the consent of all parties, which may be freely withheld. *See, e.g.*, *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 423 (5th Cir. 1998).

Capital Associates need not have made a demand for trial by jury in its original complaint. *See Wyatt v. Hunt Plywood Co. Inc.*, 297 F.3d 405, 416 (5th Cir. 2002). Rather, Capital Associates had ten days after Banc One's answer to make such a demand. *See* FED. R. CIV. P. 38(b); *id.* (noting that plaintiff has ten days after the answer is filed in which to file its jury demand even if such plaintiff originally failed to file jury demand). Banc One demanded a jury in its answer; Capital Associates was not obligated to thereafter independently demand a jury trial within such ten day period, but could, instead, rely on Banc One's jury demand and on its own right to prevent any subsequent withdrawal by

Banc One of such demand. *See* FED. R. CIV. P. 38(d); *Rachal*, 795 F.2d at 1214. Capital Associates's failure to demand a jury trial does not prejudice it from withholding its consent to Banc One's withdrawal of its jury demand. Capital Associates may freely withhold such consent, absent which the court may not permit Banc One to withdraw its demand for trial by jury. *See Allison*, 151 F.3d at 423.

C. Whether Parties' Have Right to Trial by Jury

Consent of the parties to try a matter before a jury is insufficient to confer a right to a jury trial. *See* 28 U.S.C. § 157(e) (2003) (providing that bankruptcy judge may conduct jury trial "[i]f the right to a jury trial applies"); FED. R. CIV. P. 38(b) (providing that party may demand a jury only when "issue [is] triable of right by a jury"); *Hays v. Equitex Inc. (In the Matter of RDM Sports Group Inc.)*, 260 B.R. 915, 925 (Bankr. N.D. Ga. 2001). If the party requesting a jury trial has a right to such, and if the party has not waived such right, a bankruptcy court cannot deny a jury trial. *See Granfinanciera v. Nordberg*, 492 U.S. 33, 62-64, 109 S. Ct. 2782, 2801-02 (1989).

Parties to a bankruptcy proceeding have a right to trial by jury in such proceeding if the Seventh Amendment guarantees them such right. *See Granfinanciera*, 492 U.S. at 40-41, 109 S. Ct. at 1789-90. The Seventh Amendment guarantees a right to a jury trial in "[s]uits at common law." U.S. CONST. amend. VII. The Supreme Court has interpreted this phrase to refer to "suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Granfinanciera*, 492 U.S. at 41, 109 S. Ct. at 2790 (emphasis in original) (internal quotation and citation omitted). To determine whether a

suit encompasses legal as opposed to equitable rights, the Supreme Court has outlined the following analysis:

> First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature. The second stage of this analysis is more important than the first. If, on balance, these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use a jury as factfinder.

Id., 492 U.S. at 42, 109 S. Ct. at 2790.

Furthermore, the Seventh Amendment does not entitle a party to a jury trial on a claim that is legal in nature, but that asserts a public right: "[t]he Seventh Amendment protects a litigant's right to a jury trial only if a cause of action is legal in nature *and* it involves a matter of 'private right.'" *Id*., 492 U.S. at 42 n.4, 109 S. Ct. at 2790 n.4 (emphasis added). This is based on Congress's constitutional ability to assign the adjudication of a party's public rights to a judge sitting without a jury even though the Seventh Amendment may otherwise have mandated a jury. *See id*.

In the event that a party asserts legal claims along with equitable claims, or seeks legal relief as well as equitable relief, the fact that such party asserts equitable claims and seeks equitable relief does not waive or convert such party's right to a jury on the legal claims, as well as on all common issues: "if [a] legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact." *Curtis v. Loether*, 415 U.S. 189, 196 n.11, 94 S. Ct. 1005, 1009 n.11 (1974). *Accord Duncan v. First Nat'l Bank of Cartersville Ga.*, 597 F.2d 51, 56 (5th Cir. 1979) ("It would make no difference if the equitable cause clearly outweighed the legal cause

so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury rights it creates control").

A party may either implicitly or explicitly waive its Seventh Amendment right to a jury trial. *See In re Clay*, 35 F.3d 190, 196 (5th Cir. 1994). Additionally, a party may have a legal claim, to which the right to a jury attaches, converted into an equitable claim by participating in the bankruptcy process, thereby losing the right to a jury. *See Langenkamp v. Culp*, 498 U.S. 42, 44-45, 111 S. Ct. 330, 331 (1990). Parties frequently waive or convert their jury rights by submitting themselves to the equity jurisdiction of bankruptcy. *See id*. A debtor does not, however, automatically waive jury rights merely by filing for bankruptcy. *See In re Jensen*, 946 F.2d 369, 373-74 (5th Cir. 1991). *See also Southmark Corp. v. Coopers & Lybrand (In the Matter of Southmark Corp.)*, 163 F.3d 925, 935 n.16 (5th Cir. 1999). A debtor or creditor with an otherwise valid right to a jury may lose such right through conversion of his legal claim into an equitable claim if the proceeding invokes the: (1) claims allowance or disallowance process; (2) the hierarchical ordering of creditors' claims; or (3) if the dispute is integral to the restructuring of the debtor-creditor relationship. *See Granfinanciera*, 492 U.S. at 58, 109 S. at 2799; *Billing v. Ravin, Greenberg & Zackin P.A.*, 22 F.3d 1242, 1251 n.14 (3d Cir. 1994); *In re Jensen*, 946 F.2d at 374.

Thus, when a creditor files a proof of claim in the bankruptcy, the creditor per se loses a jury right he might otherwise have had because, "by filing a claim against a bankruptcy estate the creditor triggers the process of allowance and disallowance of claims, thereby subjecting himself to the bankruptcy court's equitable power." *Langenkamp*, 498 U.S. at 44, 111 S. Ct. at 331 (internal quotations omitted). Similarly, since the assertion of a counterclaim is the functional equivalent of filing a

proof of claim, case law holds that asserting a counterclaim against the debtor converts the otherwise legal nature of an adversary into an equitable proceeding to which no jury rights attach. *See In the Matter of Peachtree Lane Assocs. Ltd.*, 150 F.3d 788, 798-99 (7th Cir. 1998); *Leshin v. Welt (In re Warmus)*, 276 B.R. 688, 693 (S.D. Fla. 2002); *Mendelsohn v. Lissauer (In re Mindeco Corp.)*, 212 B.R. 447, 450-51 (E.D.N.Y. 1997); *Carmel v. Galam (In re Larry's Apartment L.L.C.)*, 210 B.R. 469, 473-74 (D. Ariz. 1997); *Commercial Fin. Servs. Inc. v. Jones (In re Commercial Fin. Servs. Inc.)*, 251 B.R. 397, 408 (Bankr. N.D. Okla. 2000).

A debtor's invocation of the bankruptcy court's jurisdiction does not necessarily destroy jury rights. The Fifth Circuit in *Jensen* held that a debtor may pursue claims to augment the estate without losing its right to a jury, as debtor was seeking damages from a *non-creditor* third party. *In re Jensen*, 946 F.2d at 370-71. In such a case, there is no claim to allow or disallow, and there is no debtor-creditor relationship to restructure. *See id*. Thus, there is no conversion of legal claims into equitable claims. *See id*. *Jensen* hints that its result would have been different had the defendants to the adversary also been creditors of the estate: "debtor's claims do not here arise as part of the process of allowance and disallowance of claims . . . . Nor are they integral to the restructuring of debtor-creditor relations. *Rather they are essentially claims brought by the debtor (in possession) against non-creditor third parties to augment the bankruptcy estate.*" *Id.* at 374 (emphasis added) (internal citations and quotations omitted). *Accord Hays v. Equitex Inc. (In the Matter of RDM Sports Groups Inc.)*, 260 B.R. 915, 925 (Bankr. N.D. Ga. 2001) (finding no conversion of trustee-plaintiff's right to a jury because trustee asserted claims against non-creditor third parties; trustee's claims

therefore had nothing "to do with the claims process and/or restructuring of the debtor-creditor relationship").

Accordingly, in deciding whether a party to an adversary is entitled to a trial by jury, the court must find that: (1) such party has a Seventh Amendment right to trial by jury, i.e. at least one claim that it asserts, and at least one remedy, are 'legal' in nature as opposed to equitable; (2) such claims do not implicate public rights; (3) such party has not waived its right to a jury by participating in bankruptcy through, e.g. filing a proof of claim or asserting a counterclaim; (4) the nature of the proceeding has not converted legal claims into equitable claims, i.e. the party is not a prepetition creditor, the proceeding does not implicate the claims allowance or disallowance process, the proceeding does not affect the hierarchical ordering of creditors, and the proceeding does not seek to adjust the debtor - creditor relationship.

Capital Associates asserts two causes of action in this adversary. First, Capital Associates seeks to assume the Remarketing Agreement as an executory contract under section 365 of the Bankruptcy Code. Second, Capital Associates asserts a claim for breach of contract.

Jury rights do not attach to Capital Associates's first cause of action. Such cause of action is equitable. *See, generally, Bistrian v. East Hampton Sand & Gravel Co. Inc. (In the Matter of East Hampton Sand & Gravel Co. Inc.)*, 25 B.R. 193, 198 (Bankr. E.D.N.Y. 1982); *Executive Square Office Bldg. v. O'Connor & Assocs. Inc.*, 19 B.R. 143, 146 (Bankr. N.D. Fla. 1981). The Bankruptcy Code functions in equity, and the bankruptcy court, when considering issues at the heart of bankruptcy, is functioning as a court of equity. *See Curtis v. Loether*, 415 U.S. 189, 195, 94 S. Ct. 1005, 1009 (1974). Capital Associates's ability to assume an executory contract is provided by

section 365 of the Code, consideration of which employs the court's equitable jurisdiction. *See Katchen v. Landy*, 382 U.S. 323, 337, 86 S. Ct. 467, 477 (1966). In addition, the relief Capital Associates seeks on this cause of action is equitable in nature. Any asserted right to assume the Remarketing Agreement is not based on the agreement itself. Relief granted that is contrary to the legal rights created by the terms of the contract is so granted through equity. *See, e.g., Chapman v. Sheridan-Wyoming Oil Co. Inc.*, 338 U.S. 621, 625-26, 70 S. Ct. 392, 395 (1950) (noting that equity's function in contract law is to excuse one a party to a contract from literal terms of the contract); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 551, 69 S. Ct. 1221, 1228 (1949).

Capital Associates's second cause of action is for breach of contract. A cause of action for breach of contract was brought before the courts of law before the merger of law and equity, and therefore unquestionably sounds in law. *See Ross v. Bernhard*, 396 U.S. 531, 542-43, 90 S. Ct. 733, 740 (1970); *Brown v. Sandimo Materials*, 250 F.3d 120, 126 (2d Cir. 2001); *Billing v. Ravin, Greenberg, & Zackin P.A.*, 22 F.3d 1242, 1245 (3d Cir. 1994). Furthermore, Capital Associates's requested relief – monetary damages – constitutes legal relief. *See Dairy Queen Inc. v. Wood*, 369 U.S. 469, 477, 82 S. Ct. 894, 899 (1962). Accordingly, the parties have a Seventh Amendment right to a jury trial on Capital Associates's claim for breach of contract. *See, e.g., Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1563 (Fed. Cir. 1990) ("Seventh Amendment preserves a right to a jury trial on issues of fact in suits for breach of contract damages between private party litigants").

Banc One has not filed a proof of claim and is not a prepetition creditor. This adversary will not invoke the claims allowance or disallowance process, nor affect the hierarchical ordering of creditors' claims, nor is this adversary integral to the restructuring of the debtor-creditor relationship.

Just as in *Jensen*, Capital Associates's breach of contract claims "are essentially claims brought by the debtor (in possession) against non-creditor third parties to augment the bankruptcy estate." *In re Jensen*, 946 F.2d 369, 374 (5th Cir. 1991).

In fact, the present adversary is factually much like *Jensen*, wherein the Chapter 11 debtors filed an adversary post-confirmation, suing for monetary damages plus equitable relief based on prepetition contractual and tort violations, while the defendant, as in the present case, was not a prepetition creditor of the debtors. *Id*. at 370. The Fifth Circuit held that the debtors had a right to a jury, and that such right was neither waived nor converted: "debtor's claims do not here arise as part of the process of allowance and disallowance of claims . . . . Nor are they integral to the restructuring of debtor-creditor relations." *Id*. at 374 (internal citations and quotations omitted). *Accord also Hays v. Equitex Inc. (In the Matter of RDM Sports Groups Inc.)*, 260 B.R. 915, 925 (Bankr. N.D. Ga. 2001) (finding no conversion of trustee-plaintiff's right to a jury because trustee asserted claims against non-creditor third parties; trustee's claims therefore had nothing "to do with the claims process and/or restructuring of the debtor-creditor relationship").

The present adversary differs from *Jensen* in one respect. Banc One asserts a counterclaim for costs and attorney's fees, while *Jensen* is silent as to whether its defendants likewise asserted such a counterclaim. Asserting a counterclaim against the debtor is the functional equivalent of filing a proof of claim, which has lead numerous courts to hold that the assertion of a counterclaim waives or converts any jury rights. *See, e.g., In the Matter of Peachtree Assocs. Ltd.*, 150 F.3d 788, 798-99 (7th Cir. 1998); *Leshin v. Welt (In re Warmus)*, 276 B.R. 688, 693 (S.D. Fla. 2002). In the present case, however, such a holding would be inappropriate.

Those courts that have denied jury trials where the defendant asserts a counterclaim against the estate have so held because the counterclaim was a prepetition claim which would be disposed of through the equitable jurisdiction of the bankruptcy court. *See id*. In such cases, the action converted legal rights into equitable rights because, by asserting a prepetition claim, the action implicated restructuring of the debtor-creditor relationship and affected allowance or disallowance of claims against the estate. *See In the Matter of Peachtree Assocs. Ltd.*, 150 F.3d at 799 ("the submission of the [counter]claim still would trigger the process of allowance and disallowance of claims, thereby subjecting the claimant to the bankruptcy court's equitable jurisdiction" (internal quotation omitted)).

In the present case, Banc One's counterclaim is for costs and attorney's fees incurred in defending this matter. Banc One is not a creditor. A counterclaim divests parties of jury rights *because* the counterclaim is the functional equivalent of a proof of claim, the filing of which implicates the claims allowance or disallowance process and affect the debtor-creditor relationship – equity jurisdiction. *See id.* at 798. A proof of claim is asserted against the bankruptcy estate. Capital Associates's plan, however, was confirmed; the bankruptcy estate no longer exists. *See* 11 U.S.C. § 1141(b) (2002) (providing that all property of the estate vests in the debtor upon confirmation); *U.S. Brass Corp. v. Travelers Ins. Group (In the Matter of U.S. Brass Corp.)*, 301 F.3d 296, 304 (5th Cir. 2002) (noting that Chapter 11 estate ceases to exist upon confirmation of plan).

While a counterclaim that asserts a prepetition claim will waive or convert jury rights as it seeks relief against the estate, a counterclaim that does not seek relief against the estate should not serve to waive or convert jury rights. *Cf. Langenkamp v. Culp*, 498 U.S. 42, 44, 111 S. Ct. 330, 331 (1991) ("If a party does not submit a claim against the *bankruptcy estate* . . . the [] defendant is entitled to a

jury trial . . . . Accordingly, a creditor's right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the *estate*" (emphasis added) (internal quotation and citation omitted)); *Sna Nut Co. v. The Haagen-Dazs Co. Inc.*, 302 F.3d 725, 730 (7th Cir. 2002) ("To determine whether a party has submitted itself to the equitable jurisdiction of the bankruptcy court, the relevant inquiry is whether the party has submitted a claim *against the bankruptcy estate*" (emphasis added)); *Leshin v. Welt (In re Warmus)*, 276 B.R. 688, 693 (S.D. Fla. 2002) ("the claim nonetheless seeks damages from the *bankruptcy estate.* Therefore, the counterclaim is akin to the filing of a claim, and does act as a waiver as to the right to a jury trial" (emphasis added)).

If, in fact, Banc One prevails on the adversary and the court grants its counterclaim, the estate will not be liable for any damages. Rather, the post-confirmation entity will be liable for such damages. Bankruptcy will in no way be implicated; Capital Associates will be liable for the damages. *See Craig's Stores of Tex. Inc. v. Bank of La. (In the Matter of Craig's Stores of Tex. Inc.)*, 266 F.3d 388, 390 (5th Cir. 2001). Capital Associates filed suit, and opened itself up to potential damages for costs and attorney's fees at that time. This was post-confirmation conduct undertaken by the reorganized debtor. Banc One's counterclaim is not based on any prepetition or pre-confirmation conduct. Banc One's counterclaim, because it does not seek relief against the estate, does not implicate the process of allowance or disallowance of claims against the estate, nor does such counterclaim affect the debtor-creditor relationship in bankruptcy.

The court holds that Capital Associates has a right to trial by jury on its cause of action for breach of contract. *See In re Jensen*, 946 F.2d 369, 374 (5th Cir. 1991). Moreover, a right to trial

by jury exists on all common issues between Capital Associates's breach of contract action and its assumption action, even though the assumption action, standing alone, implicates no jury rights. *See Curtis v. Loether*, 415 U.S. 189, 196 n.11, 94 S. Ct. 1005, 1009 n.11 (1974); *In re Jensen*, 946 F.2d at 372. The right to jury trial based on the breach of contract claim is controlling. *See Duncan v. First Nat'l Bank of Cartersville, Ga.*, 597 F.2d 51, 56 (5th Cir. 1979).

V. Conclusion and Order

The GM Lease does not contractually waive jury rights with respect to the present parties and the present controversy. Capital Associates's cause of action for breach of contract is legal in nature, and seeks legal relief, thereby entitling the parties to a trial by jury under the Seventh Amendment on such cause of action and on all factual issues common to such cause of action. Banc One is not a prepetition creditor and seeks no relief against the bankruptcy estate; the parties have not waived their jury rights nor have such rights been converted. Finally, Banc One may not at this time withdraw its jury demand without the consent of Capital Associates. It is therefore

ORDERED that the adversary be tried to a jury.

SIGNED August 6, 2003.

ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE

The Clerk shall provide copies to:

Attorney for Plaintiff: Mark D. White and David M. Jones, Sprouse Shrader Smith P.C., P.O. Box 15008, Amarillo, TX 79105-5008; and

Attorney for Defendant: Don D. Sunderland, Mullin, Hoard and Brown, P.O. Box 31651, Amarillo, TX 79120.